in one of the early leading cases, where the admission of one joint promisor was held to take the debt out of the Statute of Limitations, Lord Mansfield said, "Payment by one is payment for all, the one acting virtually as agent for the rest."[13] The doctrine of this case has been largely repudiated on the ground that such an admission amounts to a new promise, and that the agency between joint promisors does not extend so far,[14] but it has been retained in many jurisdictions in regard to other admissions.[15] Since the law is jealous of allowing one party to be bound by acts of another and will not imply an agency save in cases of gravest necessity,[16] it is difficult to conceive of the creation of an agency from the mere fact of joint interest. The New York rule is therefore preferable—that declarations of joint obligors are not receivable unless actual authority to make them be shown.[17] Thus everywhere today declarations of joint tortfeasors are excluded unless an actual conspiracy be shown,[18] and the admission of declarations of partners, sometimes placed on the ground of joint interest, can always be explained by the agency in fact existing between them.[19]

If these views are sound, the term "identity of interest" should be discarded. The competency of admissions of parties in joint interest should be determined by the safer criterion of legal identity of persons. Manifestly, identity of interest has no application to this class of cases—the admissions are receivable because the acts and declarations of an agent are in law those of the principal.[20] The confusion attributable to the notion of identity of interest is illustrated in a recent case. *Hellman* v. *Somerville* (Mo. 1908) 111 S. W. 30. A deposition of a conspirator made at a former trial was admitted against his co-conspirators. "Identity of interest" would justify this result. But, by the great weight of authority, the reception of the admissions of a conspirator is founded upon his actual authority to act for his fellows in pursuance of the common design. He must have made the declarations while acting in furtherance of this design.[21] In the principal case his authority had terminated, and his deposition was, therefore, incompetent evidence.

LIMITATIONS ON THE RIGHT TO SUBROGATION.—The doctrine of subrogation, applied originally in favor of sureties and insurers, has come to be invoked in a large variety of other situations, where substitution to the full rights and remedies of another affords the only adequate relief. Obviously, the limits of its operation are difficult to set. Little guidance is to be had from the commonly stated rule, "Subrogation is never granted

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[13]Whitcomb *v.* Whiting (1781) 2 Doug. 652; and see Burleigh *v.* Scott (1828) 8 B. & C. 36.

[14]Kallenbach *v.* Dickinson (1881) 100 Ill. 427.

[15]Walling *v.* Rosevelt (1837) 16 N. J. L. 41.

[16]Gwilliam *v.* Twist, L. R. [1895] 2 Q. B. 84.

[17]Van Keuren *v.* Parmelee (1849) 2 N. Y. 528; Wallis *v.* Tandall (1880) 81 N. Y. 164.

[18]Wilson *v.* O'Day (N. Y. 1874) 5 Daly 354.

[19]See 8 COLUMBIA LAW REVIEW 481.

[20]Franklin Bk. *v.* P. D. & M. etc. Co. (Md. 1839) 11 G. & J. 28.

[21]Garnsey *v.* Rhodes (1893) 138 N. Y. 461; Queen *v.* Blake (1844) 6 Q. B. 126.

to volunteers,"[1] inasmuch as the term, "volunteer," has no precise meaning. A leading case describes a volunteer as one having no interest at hazard which required the payment,[2] and this is the sense adopted by most of the authorities.[3] Literally interpreted, this proposition furnishes a definite test, but it leads to a very narrow view of the scope of subrogation, hardly sustained by the decisions, except, apparently, in New York.[4] This strict rule would, in the first place, call for the existence, *prior* to the payment giving rise to the claim to subrogation, of a personal liability, or of an interest in property which might, but for the payment, be impaired; and secondly, it would require that the liability or the interest be *actual.* These conditions are satisfied in the common case of a surety or that of a junior mortgagee who discharges a prior mortgage to prevent foreclosure. But neither requirement is uniformly met. Instances of subrogation granted in the absence of an *actual* obligation or interest are not infrequent. Thus, a moral duty merely has been substituted for legal liability;[5] and, in one case even, the plaintiff's mistaken idea that he was bound as surety gave a right to subrogation.[6] Moreover, an erroneous belief that the plaintiff had an interest in land requiring protection, has often been enough to remove him from the category of volunteers;[7] for example, where a purchaser at a void judicial sale paid subsequent taxes, supposing himself the owner.[8]

The other requirement, that an obligation or a property interest exist *prior* to the payment, and actuate it, has also been disregarded. True, it is established, though not without exception,[9] that a person lending money solely on the borrower's general credit will not, in the absence of agreement, be subrogated to the original rights of an encumbrancer whose lien is removed with the money loaned.[10] And there is another set of authorities, in which the plaintiff had advanced funds to X to discharge a mortgage on the defendant's land, on the security of a supposedly valid new mortgage executed by X without authority. In these cases, although the funds were actually used to cancel the existing lien, the plaintiff was denied subrogation thereto.[11] But with this latter set of holdings must be contrasted a group of decisions which, in allowing subrogation, ignore the requirement of a prior interest or obligation—cases where the plaintiff advanced money to remove an encumbrance, and, having received from the defendant a new security which proved defective, was subrogated to the original rights of the old encumbrancers.[12] The opposed results could be reconciled on the ground that in the second group, where subrogation was

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[1]Sheldon, Subrogation, §§ 240 *et seq.*

[2]Aetna Life Ins. Co. *v.* Middleport (1887) 124 U. S. 534, 548.

[3]See Arnold *v.* Green (1889) 116 N. Y. 566, 573; Shinn *v.* Budd (N. J. 1862) 1 McCarter 234; Sanford *v.* McLean (N. Y. 1832) 3 Paige Ch. 117, 122.

[4]Cf. Koehler *v.* Hughes (1896) 148 N. Y. 507.

[5]Slack *v.* Kirk (1871) 67 Pa. St. 380; Voltz *v.* Nat. Bank (1895) 158 Ill. 532.

[6]Capehart *v.* Mhoon (N. C. 1859) 5 Jones Eq. 178; *contra,* Dawson *v.* Lee (1885) 83 Ky. 49.

[7]Sheldon, *supra,* § 36, a.

[8]John *v.* Connell (1901) 61 Neb. 267; Willson *v.* Brown (1882) 82 Ind. 471.

[9]Clark *v.* Marlow (1897) 149 Ind. 41.

[10]Kocher *v.* Kocher (1898) 56 N. J. Eq. 547; Springs *v.* Brown (1899) 97 Fed. 405.

[11]Brown *v.* Rouse (1899) 125 Cal. 645; Campbell *v.* Foster Home Ass'n (1894) 163 Penn. St. 609; Pollock *v.* Wright (1901) 15 S. D. 134; *contra,* Everston *v.* Cent. Bk. (*semble*) [ratification].

[12]Milholland *v.* Tiffany (1885) 64 Md. 455; *contra,* Rice *v.* Winters (1895) 45 Neb. 517.

allowed, the defendant had induced the payment, offering a new security; whereas, in the first group, the payment was unsolicited, and may well have disturbed the defendant's affairs. The first group might in the same way be distinguished from a third class of cases where purchasers, in the open market, of void bonds issued by a county to take up warrants of indebtedness were subrogated to the original rights of the warrant holders.[13] Any such distinction is, of course, inconsistent with the notion that one not under compulsion to discharge some liability or to protect some interest is a volunteer; but it accords with the conception occasionally advanced, that the term "volunteer" is more nearly synonymous with "intermeddler."[14]

For the rejection of the old definition of a "volunteer" and of the use of the term itself, much is to be urged. The rule requiring some "compulsion" has, to avoid injustice, been so strained in construction,[15] or riddled with exceptions, that a volunteer has come to mean, except in New York, little more than one to whom subrogation will not be granted. The substitution of the term, "intermeddler," would offer a test more fairly representing the cases; but the term is hardly comprehensive enough. Subrogation, it is conceived, although an extraordinary remedy, should, in accordance with the broad function of equity, always be granted wherever it affords the only adequate relief, and can be applied consistently with other equitable principles. So limited, subrogation to a security for which the lender failed to contract, would be denied, since equity does not grant relief for a mere error of business judgment. So, also, the remedy would be refused where the complainant has been unreasonably negligent, and, obviously, where subrogation would prejudice the rights of innocent third parties. Of course, relief would not be allowed an intermeddler, since disturbance of one's affairs by a stranger cannot be sanctioned nor conscious intrusion rewarded. This view would, it is true, require a careful examination of the facts of each case, but such an examination, a Court of Chancery is peculiarly fitted to make.

A recent New York case is illustrative. *Title Guarantee & Trust Co.* v. *Haven* (1908) 111 N. Y. Supp. 305. The plaintiff paid to a city the proceeds of a forged check, which were applied, at the forger's direction and without the defendant's knowledge, to discharge a special assessment lien on the defendant's land. The defendant had contracted to convey the land free of encumbrances, and shortly afterwards so conveyed. The plaintiff unsuccessfully sought recoupment to the amount of the lien, on the theory of a right to be subrogated to the city's original claim. Unquestionably, the plaintiff was a "volunteer" within the meaning recognized by most of the authorities, notably in New York. He had no interest in the land to be protected, real or supposed. Furthermore, the money was advanced solely on the personal credit of the depositor; it merely happened to have gone to discharge the lien. The plaintiff, however, cannot be termed an intermeddler. His sole motive was to perform a supposed obligation to

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[13]Coffin *v.* B'd of Com'rs (1902) 114 Fed. 518; aff'd. (1903) 126 Fed. 689; Irvine *v.* B'd of Com'rs (1896) 75 Fed. 765.

[14]Capehart *v.* Mhoon, *supra*, 183; Milholland *v.* Tiffany, *supra*, 145; Irvine *v.* B'd of Com'rs, *supra*, 767.

[15]E. g., Hawaiian Gov't *v.* Cartwright (1890) 8 Hawaii 697; cf. Kapena *v.* Kaleonolani (1885) 6 Hawaii 579.

the depositor. It would seem, too, that, in view of the contract to sell without encumbrances, the payment did not in fact disturb the defendant's affairs. Hence, recovery would be legitimate within the broader principle submitted. The plaintiff, however, is barred by another rule, which is undisputed,—that a subrogee acquires no remedies different from those which might have been enforced by the party to whose place he succeeds.[16] The plaintiff sought a personal money judgment. But the defendant was never subject to any personal liability to the city, because the arrears, being for local street improvement assessments, created only a charge upon the land.[17] Subrogation was therefore rightly denied.

STATE POLICE POWER UNDER THE COMMERCE CLAUSE.—In order to determine whether a particular aspect of interstate commerce is within the exclusive power of Congress, or is subject to the police power of the State, in the absence of conflicting congressional legislation, the rule is sometimes laid down that the State cannot interfere with commerce itself, i. e., intercourse, or the passing back and forth among the several States.[1] As a matter of practice, this is not strictly true. Thus, it has been held that the state may, in the exercise of its police power, delay,[2] or temporarily obstruct intercourse,[3] e. g., by prohibiting the running of trains on Sunday.[4] So the introduction of articles not fit subjects of commerce may be prohibited; but here the exception is more apparent than real, since the transportation of such articles is not commerce at all.[5] Conversely, it is said that the state may regulate the incidents or agents of commerce.[6] This rule cannot be consistently applied,[7] and overlooks the intimate connection between commerce and its instruments. The distinction is also drawn between legislation directly and indirectly affecting interstate commerce.[8] If the terms are used to indicate, on the one hand, legislation directly aimed at commerce in the narrow sense of intercourse, and, on the other, legislation aimed at the instrumentality, and consequentially affecting commerce itself, the test does not hold.[4] If the distinction is based upon causal relationship,[9] it may be answered that most regulations of the instrument by direct cause affect commerce itself.[7] It is believed that the cases professedly conforming to this distinction make degree of effect, rather than causal connection, the guide.[10] The line drawn in *Cooley* v.

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[16]Houston *v.* Br. Bk. (1854) 25 Ala. 250; Winslow *v.* Otis (1855) 5 Gray 360; Swarts *v.* Siegel (1902) 117 Fed. 13; *In re* Johnson (1880) L. R. 15 Ch. D. 548.

[17]Matter of Hun (1895) 144 N. Y. 472.

[1]Hannibal etc. R.R. Co. *v.* Husen (1877) 95 U. S. 465; Co. of Mobile *v.* Kimball (1880) 102 U. S. 691, 702.

[2]Erb *v.* Morasch (1899) 177 U. S. 584.

[3]Lake Shore etc. Ry. Co. *v.* Ohio (1898) 173 U. S. 285.

[4]Hennington *v.* Georgia (1895) 163 U. S. 299.

[5]Bowman *v.* Chicago etc. Ry. Co. (1888) 125 U. S. 465.

[6]Chicago etc. Ry. Co. *v.* Solan (1898) 169 U. S. 133.

[7]Cf. Hall *v.* De Cuir (1877) 95 U. S. 485, with Louisville etc. Ry. Co. *v.* Mississippi (1889) 133 U. S. 587.

[8]Sherlock *v.* Alling (1876) 93 U. S. 99; Smith *v.* Alabama (1888) 124 U. S. 465.

[9]Central etc. Ry. Co. *v.* Murphey (1905) 196 U. S. 194.

[10]Cf. Harlan, J., in Hennington *v.* Georgia, *supra*, 317, 318, and in Lake Shore etc. Ry. Co. *v.* Ohio, *supra*, 298 (using these terms synonymously).